If P.G.&E. P-31 is the equal of Nevada plan and being in possession of additional power for future growth (without selling), there is little to gain. (-2 to 4%)

If Nevada could purchase Shasta power, sell at P.G.&E. at Dam for same price as P.G.&E. rate, and we would agree to ~~[illegible]~~ purchase and resell to Nevada at Summit, with Nevada selling to Sierra at that point, we would be under pressure to do the same for others.

(C.: may agree to sell power to Nevada at Summit at rate than P.G.&E. rate. This might be the plan.

There we (would) be in endless trouble to do the same thing for all who might be offered the same thing.

Example - 1947

Example

	1947	
P.G.&E. rate for Sierra power	5.2	at Shasta
	2.	Shasta to Summit
	.45	standby 4000 KW
	7.65	
C.V. rate to Nevada (anywhere)	5.49	
Difference	2.16	

C.V. might sell to Nevada at Dam — at 5.20

Sierra	2.16
Total	3.04
Transmission + Standby	2.45 P.G.&E. charge
= C.V. rate	5.49

This would result in Sierra saving (under R-31

533,405	R-31	7.34
129,800	C.V.	5.49
403,605		1.85 × 72.7 MM/KWH = $134,605 or 25.2%

C.V. rate to Nevada might be

25,000 KW @ .8333 KW/mo = $20,833

72,700,000 @ 1.5 MILS = $109,050

$129,883

C.V. rate to Nevada might be $20,833. × 12 = $250,000

25,000 KW

72.7 MM/KWH @ 1.5 MILS

$109,050

$359,050 = 3.5 MILS

377,000 = 5.2

20833.33
109050
31 = 383

P.G.&E. rate Shasta $175,000 × 12 = $2,100,000

800,000,000 @ 1.5 MILS

2,100,000 / 800,000,000 = 3.38 MILS

This would mean that C.V. would lose the demand charge of $250,000 from P.G.&E. on 25,000 KW of Shasta power & P.G.&E. would not be firm and KWH (diff between 3.7 & Sierra would be dump @ 5 mils

2083

If we agreed to exchange this power on the Nevada plan for 2.45 mils per KWH and C.V. sold in Nevada at Shasta for 304 mils resulting in a total of 5.49 = to C.V. postage stamp rate it would not be far from rate of 3.8 charged to P.G.&E. at Shasta for the larger delivery on a higher load factor.

P.G.&E. 150000 KW x 8760 HRS = 800,000,000 / 1314,000,000 = 60.8% L.F.

Sierra 39.2% L.F.

Conclusion C.V. sells power to P.G.&E. at 3.38 mils @ 60.8% L.F. = 377.20 / 2160 = 5.49 .11

Practically the same

EXHIBIT 45
[2080]

2080

Docket No. E-6482 45
Exhibit No. ~~35 (Revised)~~
Date:.....
Filed with Exrs. Certification
dated 3-30-54

Preliminary

Nevada 10/11/47 NRS

90,000 KW — Max demand now 22,000 KW from Calif.
KWH 148 MM 72.7 MM

In 1952, M.D. will be 40,000 KW

This means that (assuming P.G.&E. withdraws all Shasta power) that we a substitute Shasta Power for our power in 1953. This is a much KW deal.

It does take ~~1952~~ 40,000 KW - 42.3% L.F. vs 60.5% L.F. Ps-E. of 450,000 KW out of local competition.

Shasta PH
Shasta Sub
→ Trans → Summit →

The bill (and) rate to get Shasta power to Summit will be

	1952
	744,000
Transmission	174,000
standby	30,000
	948,000
	6.35 ¢

	1952	1947
	40000 KW	22,320 KW
		7.3 ¢
Rate	6.35 ¢	7.65 ¢ (standby)
P-31	6.46	7.34
C.V.	4.94	5.49

FEDERAL POWER COMMISSION
Docket No. E-6482
Hearing Ex. No. 45
Date Identified 3-24-54
Date Admitted 3-24-54

Conclusion - Suggested plan (difference between Shasta P.G.&E. rate + transmission) and P-31 is very small and into

	1947	1952
	7.65	6.35
P-31	7.34	6.46
	.31	.11 1.7% lower

4% higher for Nevada plan

If C.V. postage stamp rate is applied (and Sierra Pacific believe it will be) then figure would (pass), compared with P-31 + standby:—

	1952
P-31	6.46
C.V.	4.94
	1.52 = 23.6%

	1952
	7.34
	5.49
	1.85 = 25.2%

But it would cost C.V. about

1952	7.31	~~to offset~~	4.94
1947	7.65		5.49

1952	1947
7.31	7.65
4.94	5.49
2.37	2.16
32.4%	28.7

[2084]

2084

Summary 1947

Sierra Pacific (includes #3,000 Standby)

			Cents
1. S.P.C.	present rate	# 581,127	.800
2. "	proposed "	639,268	.880
3. "	P-31	533,405	.734
4. C.V.		398,800	.549
5. C.V. & Shasta Pts. Rate		504,000	.765
6. C.V. " " (Special rate P.S. Ridge) proposed		639,268	
	Increase rate	58,141	+10% (+)

1 vs 2

P-31 (mine) reduce rate

2 vs 3

Thurston P-31 mine) reduce rate

If CV pays Nevada's power at Shasta at P.G.E. rate $377,200 - 5.2

and also agrees to sell to Sierra at Summit at CV rate 398,800 - 5.49

$ 21,600 .296

Difference

This $21,600 must cover losses $11,000
other charges $147,000 F.C. 147,000
Standby 30,000 30,000
$188,000

Therefore Shasta cannot with consistency do this.

P-31 do

$533,405 7.34

at Shasta $377,200 5.2

For losses F.C. [redacted] $156,205 2.14

2086

He can do it for (P-31)	#	533.405	.734 ¢
C.V at Shasta (P.S.R rate)		377,200	.520 ¢
Difference	#	156,205	.214 ¢

P-31.	#	533,405	.732
C.V. postage stamp rate		398,800	.549
difference		134,605	.185

He figure C&K can do it for	147,000	.202
with Standley	30 000	.041
	177,000	.243

It is a toss up between P-31 and C.V + postage summit
The exchange basis, plus charges, is no better than P-31

In any event C V offers # 398,800 by postage stamp rate.
P-31 is 533405
134,605 for F.C. and losses

If it costs C V # 377,000 at Shasta
How can C V sell 398,800 at Summit & Nevada
21,800 - for F.C. and losses.

EXHIBIT 46

[2087]

PACIFIC GAS AND ELECTRIC COMPANY
V. F. & E. E.

February 16, 1948

Sierra Pacific Power Company

Mr. W. G. B. Euler:

Mr. Sutherland's letter to you of February 12 states that Mr. Tracy of Sierra Pacific Power Company requests three further modifications in the proposed contract heretofore submitted to him. These modifications are as follows:

1. Permit Sierra Pacific to develop the West Walker Power Site
2. Eliminate definition of minor standby and interchange agreements
3. Modify definition of standby capacity

As to item 1, the transmission lines which we will construct will have no use other than to deliver power to Sierra Pacific. If Sierra, after our lines are constructed, reduces load on them by the construction of a new plant, a part of the capacity in our lines will be idle for some period of time. The length of this will depend on the growth of the Sierra system and the capacity of the plant it may construct. The facts from which to evaluate the carrying charges on this idle capacity can be better estimated at such time as Sierra may proceed with the development of a definite plan than is possible at the present time. I therefore suggest it would be equitable

to provide in the proposed contract that if Sierra hereafter adds to its present generating capacity, it will pay the carrying charges on the capacity in our lines made idle by such construction, the amount of such idle capacity and the length of time for which payments are to be made to be determined at the time this plant goes into operation.

As to item 2, it appears to me that a definition of "minor" seems desirable, and the adoption of some figure whether it is 500 Kw. or some other quantity would obviate the possibility of future misunderstanding. The use of a specific figure is of course no bar to mutual agreement on a specific exception at a later date if we concur with Sierra that conditions warrant it.

As to item 3 I have no comment.

In general connection with the proposed contract, the rate is less than the allocated cost of service. If we are called upon by the Public Utilities Commission to justify it when approval of the contract is requested, it can be done only on the basis of assigning a low cost of power to the supply and the use of increment costs for the balance of the items entering into the total cost of service.

J. S. MOULTON

JSM CY

CY: JBB JPC LHA RHG VRS DDS ICS

SUPPLEMENT NO. 1 TO RATE SCHEDULE FPC NO. 3

[2088]

RATE SCHEDULE F.P.C. No. 3

(Supplement No. 1)

Firm Resale Service to Sierra Pacific Power Company

1. *Applicability*

This rate schedule shall apply only to service to Sierra Pacific Power Company (hereinafter called Sierra) of the character and under the conditions set forth in the contract between Sierra and Pacific Gas and Electric Company dated March 4, 1948 (Original F.P.C. No. 3). Said contract shall remain in full force and effect except as to section 4 thereof, which section shall be superseded in its entirety by the provisions of this rate schedule.

2. *Rates*

The charges for all power delivered and service provided under said contract shall be the following:

(a) *Demand Charge*

First 2,000 Kw of maximum demand $1,632.00 per month

All excess Kw of maximum demand .425 per Kw per month

Plus

(b) *Standby Charge*

For not more than 4,000 Kw payable in equal monthly installments $30,000.00 per year

(c) *Energy Charge*

First 150 Kwh per Kw per month .8536¢ per Kwh
Next 150 Kwh per Kw per month .6111¢ per Kwh
All over 300 Kwh per Kw per month .4850¢ per Kwh

Except that for all energy furnished in excess of 8,000,000 Kwh per month, the above energy rates shall be reduced by .485 mills per Kwh.

(d) *Minimum Charge*

Applicable when the maximum demand in the current month or in the preceding 11 months has exceeded 25,000 Kw: $1.30 per month per Kw of such maximum demand.

3. *Special Conditions*

(a) *Demand:* The maximum demand in any month will be the average Kw delivery of the 30-minute interval in which such delivery is greater than in any other 30-minute interval in the month. The maximum demand to be used in computing charges under the above rates will be the mean of the actual maximum so determined for the current month and the highest such demand occurring in the year ending with the current month.

[2089]

(b) *Off Peak Demand:* Demands occurring between 10:30 P.M. of one day and 6:30 A.M. of the next following day, and on Sundays and legal holidays, will be ignored in determining the demand used for computing charges.

(c) *Power Factor:* The total charge for any month as computed on the above rates will be decreased or increased, respectively, by 0.1% for each 1% that the average power factor of Sierra's load in that month was greater or less than 85%, such average power factor to be computed (to the nearest whole per cent) from the ratio of lagging kilovolt-ampere-hours to kilowatt-hours consumed in the month, provided, however, that no power factor correction will be made for any month when Sierra's maximum demand was less than 10% of the highest in the preceding eleven months. Sierra shall at all times so conduct its operations that the power factor at the time of peak loads each day at the point of delivery hereunder shall not be less than 95%.

FEDERAL POWER COMMISSION ORDER ISSUED MARCH 13, 1953

[2090]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: HARRINGTON WIMBERLY, Acting Chairman; DALE E. DOTY, Claude L. Draper and NELSON LEE SMITH.

March 12, 1953

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY	Docket No. E-6482

ORDER SETTING HEARING ON RATE TO SIERRA PACIFIC POWER COMPANY AND SUSPENDING RATE SCHEDULE

Pacific Gas and Electric Company (Pacific), on February 2, 1953, submitted a proposed supplemental rate schedule for filing, tentatively designated as Supplement No. 1 to its Rate Schedule FPC No. 3, increasing its rates or charges to Sierra Pacific Power Company (Sierra), by an estimated $119,400 (28.4%), for the year 1953. Unless suspended by order of the Commission, the proposed supplement will become effective April 6, 1953, the date requested by Pacific, pursuant to the provisions of the Federal Power Act and the General Rules and Regulations promulgated thereunder.

Under the present agreement which is to continue until July 1965, or for a period of 15 years after the in-service date of an additional 110 kv line which may be constructed

pursuant to the agreement, Sierra now purchases approximately 40,000 kw of firm power and 4,000 kw of stand-by power from Pacific. Billing for the firm power is in accordance with a rate which is similar to Pacific's resale rate "P-31", and the standby service is billed at the rate of $30,000 per year. Pacific, by the proposed supplement, seeks to change this existing arrangement to the extent of substituting a higher resale rate which is similar to its resale rate "R" for the presently used rate in the determination of charges for firm power sold to Sierra.

The Public Utilities Commission of California, the Public Service Commission of Nevada and Sierra were invited to comment upon the proposed increase. The California Commission stated that Pacific had filed a similar application with it and refused comment at this time. The Nevada Commission by telegram dated March 2, 1953, stated that because of the present contractual arrangement between Pacific and Sierra it opposed any such increase in rates and requested a public hearing in the matter before any increase is granted. Sierra by letter dated March 7, 1953, indicated that it regards the rate contained in the proposed supplement as unreasonable and unjust and that, notwithstanding the fact that the rate

[2091]

contained // in the present agreement might fail to provide as high a rate of return as the Commission might otherwise find to be reasonable, it is just and reasonable and not unduly preferential or discriminatory because of other considerations for the rendering of service, at the time the present agreement was entered into.

The change in rates and charges proposed by Supplement No. 1 may result in excessive rates or charges; may

place an undue burden upon ultimate consumers; may be unduly discriminatory or preferential; and may result in increased rates and charges which have not been shown to be justified.

The Commission *finds:*

(1) The increased rates or charges proposed by Supplement No. 1 to Pacific's Rate Schedule FPC No. 3 may be unjust, unreasonable, unduly discriminatory or preferential.

(2) It is necessary, desirable and in the public interest that the Commission enter upon a hearing concerning the lawfulness of the rates or charges proposed by Supplement No. 1 to Rate Schedule FPC No. 3 and that said proposed rates or charges be suspended pending such hearing and decision thereon.

The Commission *orders:*

(A) A public hearing be held commencing April 6, 1953, at 10:00 A.M. (EST) in the Hearing Room of the Federal Power Commission, 1800 Pennsylvania Avenue, N. W., Washington, D. C., concerning the lawfulness of the rates or charges provided for in Pacific's proposed Supplement No. 1 to its Rate Schedule FPC No. 3.

(B) Pending such hearing and decision thereon, the proposed Supplement No. 1, referred to in paragraph (A) above, be and the same is hereby suspended and the use of the rates or charges provided therein deferred until September 6, 1953, and may not be applied to any deliveries of energy prior to that date, unless otherwise ordered by the Commis-

sion. Thereafter such proposed supplemental rate schedule shall go into effect in the manner prescribed by the Commission in accordance with the Federal Power Act.

(C) During the period of suspension, the rates or charges heretofore in effect under Pacific's Rate Schedule FPC No. 3, on file with the Commission, shall remain and continue in effect.

[2092]

(D) At the hearing ordered herein, the burden of proof to show that the proposed increased rates or charges are just and reasonable and not unduly discriminatory or preferential shall be upon Pacific.

(E) Interested State Commissions may participate as provided by Rules 1.8 and 1.37 (f) of the Commission's General Rules and Regulations (18 C.F.R. 1.8 and 1.37(f)).

By the Commission. Commissioner Draper dissenting.

LEON M. FUQUAY,
Secretary.

Date of Issuance: March 13, 1953

LETTER OF NEVADA PUBLIC SERVICE COMMISSION TO FEDERAL POWER COMMISSION, DATED MARCH 30, 1953

[2136]

STATE OF NEVADA

PUBLIC SERVICE COMMISSION

ROBERT A. ALLEN, Chairman
CHAS. V. WILLIAMS, Commissioner
HUGH A. SHAMBERGER, Commissioner
LEE S. SCOTT, Secretary

Carson City, Nevada
March 30, 1953

Federal Power Commission
Washington, D. C.

Attention: Mr. Leon M. Fuquay, Secretary

In re: Docket No. E-6482

Gentlemen:

This Commission, under date of March 2, stated in a telegram addressed to you that it opposed any increase in rates as requested by Pacific Gas and Electric insofar as the request concerned the Sierra Pacific Power Company purchase of power at wholesale for retail to its customers in the State of Nevada on the following grounds:

1—The retail sale of power so purchased by Sierra Pacific Power Company is under the jurisdiction of this Commission as to rates and rules and regulations.

2—This Commission has been advised and so believes that contract between Pacific Gas and Electric and Sierra

Pacific Power Company was promoted by Pacific Gas and Electric and they agreed to furnish Sierra Pacific Power Company with electricity for the use of the people of western Nevada for a term of 15 years at a rate which was below that offered by other power companies and which rate compared favorably with the rates offered to Sierra Pacific Power Company by the Bureau of Reclamation.

3—As one of the obligations assumed by Sierra Pacific Power Company to obtain its electricity from Pacific Gas and Electric, Sierra Pacific Power Company had to agree that it would buy all of its power from Pacific Gas and Electric over and above that which it could generate in its own plants as were in existence on the date of the contract, March 4, 1948.

4—Over 80% of the customers to which Pacific Gas and Electric furnishes power through Sierra Pacific Power Company are located in the State of Nevada.

5—Had there been any doubt of the validity of the contract between the two companies, this Commission would have ordered Sierra Pacific Power Company to construct its own power stations on the Truckee, Carson, and Walker Rivers in Nevada and a steam plant to supplement the hydro power developed on those streams.

[2137]

6—At this late date any abrogation of the contract, or modification of the same, would continue to deprive Sierra Pacific Power Company of its right to seek power elsewhere at favorable rates, and after Sierra Pacific Power Company

has invested over one million dollars in facilities for the purpose of performing its part of the contract.

Sierra Pacific Power Company has been forced to refrain from expanding its own generating capacity because of its obligation under the contract which it had entered into in good faith with Pacific Gas and Electric.

Pacific Gas and Electric stated to the California Public Utilities Commission that the contract so made with Sierra Pacific Power Company was beneficial to Pacific Gas and Electric's shareholders and "should it prove non-compensatory, the shareholders rather than the customers of Pacific would bear any resulting burden". Therefore, if the said contract is altered and the rates increased, it will be unreasonable and injurious to the public interest of the State of Nevada and its people.

The State of Nevada, through its Public Service Commission, prays that the contract be not altered and the petition for increased rates as filed by Pacific Gas and Electric be denied.

Sincerely yours,

PUBLIC SERVICE COMMISSION OF NEVADA

/s/ ROBERT A. ALLEN

Robert A. Allen

Chairman

RAA:jm

FEDERAL POWER COMMISSION ORDER ISSUED SEPTEMBER 21, 1953

[2491]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Nelson Lee Smith, Dale E. Doty and Seaborn P. Digby.

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY	Docket No. E-6482

ORDER FOR REARGUMENT

The Commission *orders:*

The above-entitled matter is set for reargument before the Commission in the Commission's hearing room at 441 G Street, N. W., Washington, D. C., commencing at 10:00 a.m. (EST) October 12, 1953. At such reargument the Commission desires that counsel particularly address themselves to the following questions, assuming, *arguendo*, that the proposed increased rates will stand as the legally enforceable rates unless the Commission finds that they are unlawful and prescribes other rates:

(1) How has the rate of return derived under the contract in the period since it was entered into compared with the rate of return foreseen or reasonably foreseeable by P.G.& E. when it entered into the 1948 contract, and with the rate of return experienced initially under the 1948 contract?

(2) How has the growth in amount of capacity and energy sold under this contract compared with the growth foreseen or reasonably foreseeable by P.G.& E. when it entered into the 1948 contract, in its effect on rate of return from this sale?

(3) How has the increase in operating expenses and plant investment allocable to this business compared with that foreseen or reasonably foreseeable by P.G.& E. when it entered into the 1948 contract?

(4) What has been the net effect of changes not foreseen and not reasonably foreseeable by P.G.& E. in the amount of capacity and energy sold under this contract and in operating expenses and plant investment allocable to this business?

[2492]

(5) Was the rate of return on this business which was experienced during the year 1952 a rate of return foreseen or reasonably foreseeable by P.G.& E. at the time the contract was entered into?

(6) How has the rate of return derived under this contract since it was entered into compared with the rates of return derived under the other special contracts under which P.G.& E. sells electricity for resale?

By the Commission.

LEON M. FUQUAY,
Secretary.

Adopted: September 17, 1953
Issued: September 21, 1953

FEDERAL POWER COMMISSION ORDER ISSUED SEPTEMBER 28, 1953

[2493]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: CLAUDE L. DRAPER, Acting Chairman; DALE E. DOTY and SEABORN L. DIGBY.

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY	Docket No. E-6482

ORDER REQUIRING ACCOUNTING FOR DIFFERENCES RESULTING FROM INCREASED RATES COLLECTED UNDER NEW RATE SCHEDULE

On February 2, 1953, Pacific Gas and Electric Company (PG&E) filed a proposed supplemental rate schedule, tentatively designated as Supplement No. 1 to its Rate Schedule FPC No. 3, increasing its rates or charges to Sierra Pacific Power Company (Sierra) by an estimated $419,400 (28.4%) for the year 1953.

By order issued March 13, 1953, in the above-entitled matter, the Commission, pending hearing and decision on the lawfulness of the proposed rates or charges, suspended the proposed supplemental rate schedule and deferred the use of the rates or charges therein provided until September 6, 1953.

The proceeding initiated by the suspension order not having been concluded prior to September 6, 1953, the rates or charges as set forth in the proposed supplement became effective as of September 6, 1953, pursuant to the provisions of Section 205(e) of the Act, subject to the further provision of that section of the Act that:

* * * the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.

The Commission *finds*:

(1) It is appropriate to carry out the provisions of the Federal Power Act to order as hereinafter provided.

[2494]

The Commission *orders*:

(A) PG&E shall keep accurate accounts in detail of all amounts received by reason of the increased rates of charges effective as of September 6, 1953, and report in writing and under oath to the Commission monthly for each billing period the revenues obtained from sales to Sierra as computed under the rates or charges in effect immediately prior to September 6, 1953, and under the rates or charges effective September 6, 1953, together with the difference in the revenues so computed; PG&E shall set up on its books of account a special reserve in amount equal to such differences, as they accumulate, plus interest thereon at the rate of 6 percent per annum, for the purpose of refunding for the benefit of those entitled thereto any portion of the increased rates or charges found by the Commission

in this proceeding not justified, such reserve to be maintained pending the further order of this Commission.

(B) If not otherwise provided by state commission action, those entitled to the benefit of the refund provided in the preceding paragraph shall be the retail customers served by Sierra Pacific and by its wholesale customers unless, and except to the extent that, the benefit of the aggregate of any differences in PG&E's charges resulting from he final order of this Commission shall previously have been passed along to them. That benefit shall be deemed to have been passed along to them if and to the extent that (i) proportionate refunds, with interest, shall have been made to them pursuant to binding agreements (made as of the time they are billed for service during the period following September 6, 1953) to do so if this Commission shall subsequently prescribe a lower rate for PG&E than the increased rate effective on that date; or (ii) an intermediate purchaser shall have charged its customers at rates reflecting a lower cost of purchased power than its actual cost following this increase; or (iii) such retail customers are served by a publicly owned and operated utility, or by a consumer cooperative, to which payment shall have been made of a proportionate refund, with interest. If and to the extent that an intermediate purchaser shall have passed along the benefit of such differences it shall be entitled to receive and keep the refund, with interest.

By the Commission.

J. H. GUTRIDE,
J. H. Gutride,
Acting Secretary.

(SEAL)

Adopted: September 25, 1953
Issued: September 28, 1953

FEDERAL POWER COMMISSION ORDER AND OPINION NO. 270

(Majority Opinion)

[2583]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: JEROME K. KUYKENDALL, Chairman; CLAUDE L. DRAPER, NELSON LEE SMITH, DALE E. DOTY and SEABORN L. DIGBY.

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY	Docket No. E-6482

OPINION NO. 270

OPINION AND ORDER TERMINATING PROCEEDING

This is a proceeding under Section 205(e) of the Federal Power Act to determine the lawfulness of a proposed rate increase estimated to amount to $419,400 (28.4%) on the basis of 1953 operations, for wholesale electric service rendered by the Pacific Gas and Electric Company (PG&E) to the Sierra Pacific Power Company (Sierra).[1]

[1] Sierra has received wholesale electric service from PG&E under several successive contracts since 1923. The service here involved is rendered by the delivery of energy by PG&E over two 60-kv and one 110-kv transmission lines extending approximately 27 miles from PG&E's Drum Substation and Spaulding hydroelectric plant on its interconnected system which serves a large portion of the State of California, to Summit near the Donner Pass where the energy passes to like lines of Sierra and is then transmitted to Sierra's interconnected system serving load centers chiefly located in northern and northwestern Nevada and to a minor extent in eastern California.

The increase was proposed on February 2, 1953, when PG&E tendered for filing, pursuant to Section 205(d) of the Act, a proposed supplemental rate schedule, to become effective April 6, 1953, tentatively designated as Supplement No. 1 to its Rate Schedule FPC No. 3. PG&E, by the proposed supplement, sought to substitute the in-

[2584]

creased demand // and energy rates for those theretofore used[3] in billing Sierra for approximately 40,000 kw of firm power purchased from PG&E under an agreement, designated as PG&E's Rate Schedule FPC No. 3, entered into March 4, 1948. That agreement, by its terms, is to continue until July 1965, or for a period of 15 years after the in-service date of an additional 115-kv line which may be constructed pursuant to the agreement. The proposed supplemental rate schedule would leave unaltered other terms of the 1948 agreement including (1) the provision for the purchase from PG&E by Sierra of 4000 kw of power as stand-by for hydroelectric generating plants on Sierra's system at the rate of $30,000 per year, (2) the 15-year term provision, (3) the minimum bill provision, and (4) the provision which prevents Sierra from building any additional generating facilities or from obtaining any of its energy supply from any other new source except under "minor standby and minor exchange agreements" for the duration of the agreement.

---

[2] The proposed demand and energy charges are similar to PG&E's schedule "R" now on file with the Public Utilities Commission of California as a rate generally available for service in intrastate commerce to resale customers with no generating facilities of their own and purchasing only from PG&E.

[3] The demand and energy rates which would be superseded are similar to PG&E's schedule "P-31" formerly on file with the California Commission as a rate generally available for service in intrastate commerce to resale customers with no generating facilities of their own and purchasing only from PG&E.

The Public Utilities Commission of California, the Public Service Commission of Nevada, and Sierra were in-

vited to comment upon the // proposed increase. The California Commission declined to comment in view of the pendency of a related proceeding before it. The Nevada Commission filed a response in which it stated that because of the present contractual agreement between PG&E and Sierra it opposed the proposed increase and requested that a public hearing be held before any increase be granted. Sierra also requested a hearing before this Commission stating that it regarded the rates contained in the proposed supplement to be unjust and unreasonable because the former rates had been designed to meet a competitive situation, and in any event that it possessed certain contract rights under the 1948 agreement which could not be changed under the rate filing and suspension provisions of Section 205 of the Act, but only under the rate complaint and investigation provisions of Section 206 upon a finding that the 1948 contract and rates are unlawful.

By order issued March 13, 1953, this Commission suspended the rate increase embodied in the proposed supplemental rate schedule and ordered that a hearing be held concerning the lawfulness of the proposed rate.

Sierra's petition for leave to intervene was granted but the Commission denied Sierra's further request to reject the proposed supplement as improperly filed under Section 205. That request was made by Sierra in order to obtain a determination by this Commission, in advance of any determination on the merits of the proposed rate, that contract rights may not be changed under the rate filing and suspension provisions of Section 205 of the Act. The

denial was stated to be without // prejudice to Sierra's right thereafter to maintain its contentions. An application for rehearing of the refusal to reject the proposed supplemental rate schedule was dismissed by an order which stated that:

> "The petition for rehearing * * * must be dismissed as being improperly filed because the matters therein sought to be reviewed involve only an interlocutory and procedural ruling and do not involve a final decision by this Commission of the only substantive issue as to which a rehearing is sought."

On May 1, 1953, the hearing set by our order of March 13, 1953, was concluded after all parties were afforded an opportunity to present evidence in support of their respective positions. The intermediate decision procedure was omitted and oral argument was presented by all parties before the full Commission.

Subsequent to the oral argument the Commission set the proceeding down for further argument on the following six questions:

> "(1) How has the rate of return derived under the contract in the period since it was entered into compared with the rate of return foreseen or reasonably foreseeable by P.G.&E. when it entered into the 1948 contract, and with the rate of return experienced initially under the 1948 contract?
>
> "(2) How has the growth in amount of capacity and energy sold under this contract compared with the growth foreseen, or reasonably foreseeable by P.G.&E. when it entered into the 1948 contract, in its effect on rate of return from this sale?

"(3) How has the increase in operating expenses and plant investment allocable to this business compared with that foreseen or reasonably foreseeable by P.G.&E. when it entered into the 1948 contract?

"(4) What has been the net effect of changes not foreseen and not reasonably foreseeable by P.G.&E. in the amount of capacity and energy sold under this contract and in operating expenses and plant investment allocable to this business?

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"(5) Was the rate of return on this business which was experienced during the year 1952 a rate of return foreseen or reasonably foreseeable by P.G.&E. at the time the contract was entered into?

"(6) How has the rate of return derived under this contract since it was entered into compared with the rates of return derived under the other special contracts under which P.G.&E. sells electricity for resale?"

PG&E thereafter requested further hearing after failure of all counsel to reach an agreement as to the enlargement of the record (without additional hearing) which counsel for PG&E and Sierra deemed necessary in addressing themselves to the questions for consideration on reargument. Such further hearing was held and all parties afforded an opportunity to present additional evidence in support of their respective positions. That hearing was concluded on March 24, 1954.[4]

On April 23, 1954, reargument on the questions we had posed was presented by all parties before the full Commission.

[4] The record as enlarged includes certain exhibits proffered by Staff Counsel at the conclusion of the prior hearing held in this proceeding.

Subsequently, Sierra requested leave to file certain proposed supplemental findings of fact and conclusions of law in support of certain contentions hereinafter summarized. Counsel for PG&E and Staff Counsel opposed the requested findings. In the view we take of this proceeding as hereinafter set forth we regard those requested findings and conclusions as unnecessary or unwarranted.

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Jurisdiction

Inasmuch as no question concerning this Commission's jurisdiction over the sale here involved was raised by any party to this proceeding, jurisdiction being specifically admitted by both PG&E and Sierra, we will pass on first to a consideration of the lawfulness of the proposed rates as contemplated by the requirements set forth in Sections 205(a) and (b) and then to a consideration of Sierra's contentions concerning the scope of the rate filing and suspension provisions of Section 205 of the Act.

Reasonableness of the Proposed Rate

With a possible exception which we later will show to be unfounded, there is no dispute that the proposed rate will not provide more than PG&E's cost of rendering the service here involved to Sierra, including in such costs return on an allocated portion of PG&E's net investment at a rate of return (5½%) which would be reasonable for its electric operations as a whole. The cost of service based on the test year 1952 is shown by an exhibit (Exhibit 19) prepared at the Staff's request by PG&E in accord

with applicable precedents of this Commission.[5] // That exhibit shows that the proposed rate will provide revenues sufficient to yield a return to PG&E of 4.75% on a net investment rate base.

Staff counsel regarded the cost of service for the test year as requiring adjustment to reflect lower income taxes in the immediate future which would result from PG&E's accelerated amortization of certain of its facilities in computing state and federal income taxes.[6] If any adjustments in the test year figures are to be made, PG&E's counsel thought adjustments should be made to reflect increased operating expenses from wage increases granted during the test year but reflected in its exhibits only for a part of the year, increases which have already occurred in fuel costs, and increases in expenditures for fuel which would have resulted had the test year been an average instead of an exceptionally high water year. Evidence to support such adjustments was not introduced because they would be too small to affect the conclusions predicated upon the use of the unadjusted test year figures. Accordingly, we find the use of the unadjusted test year figures for cost of service sufficient for the purposes of this proceeding.

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[5] Incorporated within Exhibit 19 are certain changes proposed by the Staff from the method of computing cost of service and rate of return used by PG&E in its Exhibits 3 and 4. Basically Exhibit 19 develops cost of service by applying a 5½% rate of return, which all parties agreed for the purposes of this case would be reasonable for PG&E's electric operation as a whole, to a net investment rate base computed by deducting from original cost of plant the accrued depreciation reserve requirement and adding working capital. This method of computing cost of service and rate of return is consistent with prior determinations by this Commission and is reasonable in this proceeding, as is the 5½% rate of return stipulated by the parties to be a reasonable rate of return for PG&E's electric operations as a whole, and the method of computation adopted by PG&E in its Exhibits 3 and 4 insofar as it departs from that used in Exhibit 19 is not accepted.

[6] That was before our decisions issued December 4, 1953, in Opinion 264 and April 15, 1954, in *Panhandle Eastern Pipe Line Co.*, Opinion No. 269 (mimeog., pp. 45-49).

Notwithstanding the fact that even the proposed increased rate will not provide a 5½% rate of return, Sierra urges that this is of no consequence in this proceeding. It argues that the present lower contract rate is just and reasonable because that rate, along with all other terms of the 1948 agreement, was offered by PG&E in an effort

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to retain // Sierra as a customer during a period when, it says, alternative sources of power were available to it at competitive rates. Sierra maintains that it gave up all opportunity to meet its system power requirements from such other sources, notably from the United States Bureau of Reclamation, in reliance upon the binding effect of all terms of the 1948 agreement. It insists that to change the rate set forth in the 1948 agreement and leave unaltered, among other things, the 15-year term provision, the minimum bill provision and the provision against utilization of other sources of power would be grossly unfair. Sierra seeks support from the California Commission's orders originally approving the 1948 agreement and subsequently refusing to authorize an increase in the rate provided therein.

Although the Commission is not confined to one particular method of determining whether a rate is just and reasonable (Cf. *F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 585-586), we have, upon an examination of the record in this proceeding concluded that sufficient reason has not here been shown for departing from the cost of service method, for the following reasons:

First, we cannot accept Sierra's premise that because the 1948 contract rate was negotiated under competitive

conditions, that rate necessarily remains just and reasonable. For it has long been well established that a public utility cannot by contract place its rates beyond the reach of regulation by public authority. *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372, 375; *Producers Transp. Co.* v. *Railroad Commission*, 251 U. S. 228, 232; *F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 582-583.

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Second, we find Sierra's argument that it has foregone other sources of supply in reliance upon the continuance of all terms of the 1948 agreement unconvincing in the light of the record which clearly shows that in 1948 Sierra regarded the other sources of supply as being so unacceptable that PG&E became, in fact, the only feasible source.

Third, we also find unconvincing Sierra's argument that it would be grossly unfair to change the rate set forth in the 1948 contract while leaving all other terms unaltered, in view of the fact that Sierra has not shown, and on cross examination its president could not suggest, any alterations which he thought should be made in other terms if the rate were changed as proposed.

Fourth, with respect to the California Commission's orders, we fail to see how they can bind this Commission in the exercise of its jurisdiction or limit the effectiveness of the filing provisions of the Federal Power Act,[7] even if they were to be construed as Sierra argues. We do not undertake to decide whether they should be so construed for the question of the jurisdiction of the California Commission is disposed of by the facts upon which we

[7] State Commission regulation, even in matters properly within the jurisdiction of the state commission, is no limitation on subsequent federal regulation. *United States* v. *New York Telephone Co.*, 326 U. S. 638, 647-648.

find that the sale is a sale at wholesale in interstate commerce subject to the regulation provided in the Federal Power Act. See *United States* v. *P.U.C. of California*, 345 U. S. 295.

Fifth, even if PG&E's entry into the 1948 contract were to be accepted as demonstrating that the then foreseeable

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rate of return under // that contract must be deemed the rate of return which is still reasonable for this particular business, it appears from the record here that due to the increases in other costs which have occurred since then the presently proposed increase will merely restore that rate of return, not go above it.

We think it necessary to discuss in more detail only the fifth of these conclusions.

In order to compare the rate of return which the proposed rate is expected to produce with that reasonably foreseeable at the time the 1948 contract was negotiated, PG&E made comparisons of costs of service, computed by the same methods which it had initially employed in this case (Exhibits 3 and 4, referred to in footnote 5 above). While those methods produce lower rates of return than the methods employed in the exhibit upon which we principally rely in our findings herein and indicate, for example, that 1952 earnings under the proposed rate would be 3.23% instead of 4.75%, we find that the use of those methods provides a sufficient basis for the following comparison among themselves of rates of return under the two schedules for different years:

[8] PG&E's exhibits show that the increase in volume of sales to Sierra (over the forecast as of the time the 1948 contract was negotiated), with the resulting decrease in revenue per unit of service, was responsible for only a very insignificant part of the decrease in the actual rate of return below what was reasonably foreseeable. This was not disputed.

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Year	Reasonably foreseeable rate of return under 1948 contract rate, as of the time it was negotiated (%)	Reasonably foreseeable rate of return under proposed rate on this record (%)
1947	3.56	
1952	3.03	3.23
1956	3.12	3.15
1963	3.20	3.35

Within the margin for errors which we would expect in such computations these figures indicate that there is no substantial difference between the rate of return which PG&E seeks by the present proposal, and that which was reasonably foreseeable at the time the 1948 contract was negotiated.

We do not find Sierra's arguments against these figures persuasive.

Thus Sierra contends that what we have denominated "the reasonably foreseeable rate of return under 1948 contract rate as of the time it was negotiated" is purely hypothetical—never actually presented to PG&E's management in those figures and in writing at the time the contract was being negotiated. But it is clear to us from the evidence of record that PG&E's management did have

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substantially equivalent information.[9] // For we think it must reasonably be inferred that PG&E's management

[9] The record shows that these percentages were developed from a cost of service study based upon 1946 costs made and submitted to the management for the purposes of the negotiations which eventually resulted in the 1948 contract rate. They embody only two further adjustments: the decreased revenues the 1948 contract rate would provide as compared with PG&E's first offer to Sierra, and recognition that by the time agreement was actually reached PG&E's operating costs had advanced 10% over the 1946 levels used in the cost of service study (the latter is, of course, in the nature of a concession against interest by PG&E).

was capable of and did appreciate the effect of the only substantive adjustments reflected in these figures to the cost of service study then made for it, and did not have to have the figures presented in the same form as they have been presented here in order to be guided by the same essential considerations.

So also we think that Sierra misinterprets the significance of the papers drawn from PG&E's files upon which it rests its contention that PG&E expected a 6% rate of return from the Sierra business at the P-31 rate, and based that expectation upon the use of a different method of allocating costs to the service to Sierra. That question was orally argued at length at the reargument before the Commission and we have concluded that the computations referred to by Sierra related to alternative offers which might be made to Sierra and whether there was any real likelihood of a better offer than PG&E's P-31 rate (plus a charge for 4,000 kw of standby capacity for Sierra's hydro plants). They were not computations of PG&E's costs of service under the P-31 rate, and involved no assumption that those costs would properly be determined upon any other basis of allocation than that reflected in the percentage figures we have set forth.

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Even if PG&E's management had, for some purpose, assumed that only the costs of transmission from Shasta to Summit plus PG&E's cost of power purchased from the Central Valley Project should be deemed its cost of service to Sierra, we could not accept that fact as a sufficient reason for this Commission to depart from its consistent practice, absent special circumstances, and accept such an "allocation" as a basis for a forecast of costs of or a rate

of returns from PG&E's service to Sierra under the P-31 rate.[10]

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Sierra's particular reliance upon Mr. J. S. Moulton's memorandum of February 16, 1948, as indicating the contrary is wholly unavailing. Mr. Moulton seems at most to be suggesting a possible method of attempting to justify before the California Commission the 1948 contract rate which he recognizes would return less than the properly allocated cost of the service—a method which never appears to have been adopted by PG&E:

> "In general connection with the proposed contract, the rate is less than the allocated cost of service. If we are called upon by the Public Utilities Commission to justify it when approval of the contract is requested, it can be done only on the basis of assigning a low cost of power to the supply and the use of increment costs for the balance of the items entering into the total cost of service."

Accordingly, we conclude that the proposed rate is not unjust or unreasonable.

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[10] If such an "incremental" cost basis were to be adopted, on the uncontroverted evidence in this record the P-31 rate would still not provide a 6% return, or any return at all on PG&E's investment in the transmission facilities. Sierra's claim that it would is based on the assumption that the Central Valley Project power required to serve Sierra would have cost PG&E 3.74 mills per kwh for 232,000,000 kwh including 10% losses, or $870,000, in 1952, leaving $328,000 to cover PG&E's $375,000 cost of transmission from Shasta to Summit.

But the figure of $870,000 for cost of Central Valley Project power is based on the 1952 average cost to PG&E of all the energy if purchased from Central Valley Project, including not only firm power (the kind required to serve Sierra) but very large amounts of dump power, which would not meet Sierra's needs or satisfy its contract right to receive firm power. If PG&E's cost of firm power purchased from the Central Valley Project is used, $1,109,000, the revenues produced by the P-31 rate would barely have covered that cost, leaving only $89,000 remaining to meet the $375,000 transmission cost.

Furthermore, there is no warrant for the Commission to adopt a method of determining cost of serving a particular customer from an integrated electric power supply system which considers only the cost of energy from a single source of power on that system.

DISCRIMINATION

It does not appear that the proposed rate will be unduly discriminatory or preferential.

That rate is substantially the same as that used by PG&E in rendering wholesale electric service to the California-Oregon Power Company pursuant to a special contract filed as its rate schedule FPC No. 6, which is the only other schedule PG&E has on file with this Commission involving a firm sale for resale in interstate commerce. The two services appear to be generally comparable except that the cost of rendering the California-Oregon service is roughly 1/ less than the cost of this service, such differen-

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tial being due to the special // investment in PG&E's three transmission lines from its Drum Substation and Spaulding hydroelectric plant on its interconnected system to Summit where delivery is made to Sierra, and the additional cost of maintaining and operating these lines. However, inasmuch as the record does not show that the rate to California-Oregon exceeds the cost of rendering that service, causing it to bear a disproportionate share of PG&E's total expenses, or show that ultimate consumers

[1] The method used in preparing Exhibit 19, which PG&E's witness thought reasonable, does not distinguish the costs associated with the special facilities used solely to serve Sierra from those associated with PG&E's total integrated plant, but rather, treats such special facilities as part of PG&E's total integrated plant, a portion of which is allocated to Sierra. The Commission's Staff suggested such treatment in view of the failure of PG&E to exclude costs associated with similar special facilities for serving certain other customers or areas from total integrated plant costs, a portion of which PG&E had allocated to Sierra in addition to the costs associated with the special facilities used solely to serve it. Under the circumstances of this case we find the treatment of special facility costs embodied in Exhibit 19 reasonable for the purpose of determining the reasonableness of the rate to Sierra; but for the purpose of comparing the rates to Sierra with those to California-Oregon the investment in special facilities to serve Sierra, and expenses of operating them, must be recognized, as it is in the text.

affected by that rate are at a competitive disadvantage as compared with ultimate consumers served by Sierra, this differential does not of itself make the proposed rate unduly discriminatory or preferential.

In addition to the foregoing the record shows that PG&E renders generally comparable wholesale electric service in intrastate commerce under special contract to the Cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompac,

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Palo Alto, Redding, Roseville, Santa Clara, Ukia, the Plumas-Sierra Rural Electric Cooperative, and the Sacramento Municipal Utility District at rates between 14% and in one case 38% below the proposed rate to Sierra. However, as it does not appear from the record that these rate differentials will cause the Sierra service to bear any disproportionate part of PG&E's total expenses, inasmuch as even with the proposed increase the rate to Sierra will not exceed the cost of serving it, or that either Sierra or the ultimate consumers served by it will suffer any competitive disadvantage by reason thereof, these differences do not appear to amount to an undue preference or discrimination.

We conclude that the proposed demand and energy rates set forth in Supplement No. 1 to PG&E's Rate Schedule FPC No. 3 are not unjust or unreasonable, and not unduly discriminatory or preferential, and are therefore not unlawful.

The Fixed-Rate Provisions of the Act

Sierra, in opposing the proposed increase, has advanced the following contentions with respect to the procedures

by which an increase in a contract rate may become effective:

> First, that Section 205 of the Act does not authorize an alteration of a contract to be effectuated by the unilateral act of a public utility filing a new rate schedule or by an order of the Commission entered in a proceeding held on the suspension of such a filing. Rather, it says, such alterations

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> may be accomplished only // in a rate investigation under Section 206, upon a finding that the contract and rate fixed therein are unlawful.
>
> Second, that when a new schedule is filed pursuant to Section 205(d) embodying a change in a contract rate previously on file with this Commission, the previously filed contract and rate set forth therein must be found to be unjust, unreasonable, or unduly discriminatory or preferential, before the new rate can be allowed to stand.

We will not pause to discuss the apparent inconsistency of these contentions, the first denying that a contract can ever be altered under Section 205 and the second arguing that it can be altered under that section if a certain finding (not specified in that section) is made, but will proceed to a consideration of each in turn, they having been exhaustively briefed by both Sierra and the Staff Counsel.

On each of the several previous occasions when we have been called upon to interpret the scope of Section 205 of the Power Act or the equivalent Section 4 of the Natural Gas Act, we have rejected any contention that an abroga-

tion of contract rights may not be worked by the operation of the statutory rate filing and suspension provisions.

In *City of Los Angeles* v. *Nevada California E. Corp.*, 2 F.P.C. 104, the defendant public utility contended that the Commission did not have power to reduce a contract rate charged a municipal wholesale purchaser on complaint by the purchaser because, defendant argued, the

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seller did not have a correlative right to secure an increase if the rate were too low. We answered by stating that the seller did have a correlative right—the right to file increased rates (2 F.P.C. at page 109):

> "Under Section 205(d) of the Act, public utilities may file with the Commission proposed changes in their filed rates and charges. This provision appears to negative defendant's contention and to afford adequate protection to it.

In *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 F.P.C. 1044, *petition to review dismissed*, 170 F.P.C. 150 (C.C.A. 8) we allowed a supplemental rate schedule filed pursuant to Section 4(d) of the Gas Act to become effective without the 30-day delay otherwise prescribed by that section. The supplement added a surcharge to contract rates which had previously been reduced pursuant to Commission order. The effect of the surcharge was to increase the contract rates (as previously modified by the Commission).

The result of the ruling of the Court was that without any Commission finding or other action, the seller was able by its unilateral action of filing the surcharge to change the contract rate notwithstanding the objection of the buyer.

In *Panhandle Eastern Pipe Line Co.*, 9 F.P.C. 443, we overruled a contention advanced by customers of Panhandle that this Commission lacked authority under Sections 4 and 5 of the Gas Act to order the allocation of gas to customers of Panhandle on terms different from those contained in existing contracts, citing our prior decision in

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City of // *Detroit* v. *Panhandle Eastern Pipe Line Co.*, 6 F.P.C. 196, 204, in which we had relied upon *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372, and *Producers Transp. Co.* v. *Railroad Commission*, 251 U. S. 228, and pointing out (9 F.P.C. at page 446):

> "Section 4 of the Natural Gas Act, as well as Section 5, provides an adequate legal basis for our order. See *Ayreshire Corp.* v. *United States*, 335 U. S. 573 (1949)."

Section 4 of the Gas Act corresponds insofar as material here to Section 205 of the Power Act, and Section 5 of the Gas Act, to 206 of the Power Act.

We have carefully examined Sierra's first contention and must reject its argument that the express language of Section 206 supplementing the authority of this Commission under that section to fix rates found to be unjust, unreasonable, unduly discriminatory or preferential, with the power to "fix" "any * * * contract * * * affecting such rate," found to be unjust, unreasonable, unduly discriminatory or preferential, establishes the only procedure by which an abrogation of a contract rate may be accomplished under the Power Act, and therefore necessarily precludes any action under Section 205 which would have the effect of changing an existing contract rate.

Indeed, even a cursory examination will show that the provisions of Section 205 expressly authorize the alteration of contracts. Section 205(c) provides for the filing of "schedules showing all rates and charges * * * together with all contracts which in any manner affect or relate to such rates or charges * * *." Section 205(d) authorizes

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changes in any "rate" or "charge" or in any "contract" relating to such "rate" or "charge" to be effectuated "by filing with the Commission * * * new schedules stating plainly the change or changes to be made in the schedule or schedules then in force * * *." Section 205(e) confers upon the Commission the power to suspend changes sought to be effectuated under Section 205(d) and provides by reference power to prescribe the "rate" or "contract" to be thereafter observed if it finds the rate or charge as proposed unjust, unreasonable, unduly discriminatory or preferential. If it does not so find, the Commission fixes no new rate or contract and the proposed rate or charge filed pursuant to Section 205(d) becomes effective upon termination of the Commission's suspension, under the authority of Section 205(d).

Only because a public utility making sales at wholesale has the power acting unilaterally by filing changed rate schedules to change the rates fixed by its prior contracts can it perform the duty which was shown to be upon it when the Court in *Pennsylvania W. & P. Co.* v. *Consolidated G.E.L. and P. Co.*, 184 F. 2d 552 (C.A. 4), *certiorari denied*, 340 U. S. 906, said that:

> "One of the most important duties of a public utility, inherent in its franchise to serve the public, is the duty to take the initiative in proposing rea-

> sonable rates and rendering adequate services, taking into account changing conditions * * *."

As to Sierra's second contention that the old contract rate must be found unlawful before a new rate can take effect, we believe that the provisions of Section 205 show that it is clearly without merit. There is nothing in that

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section that qualifies or limits the // right and duty placed upon the seller to maintain rates which satisfy the statutory standard by any requirement for the consent of the buyer or for a Commission finding with respect to the former contract rate. The sole condition is that the filed rate may not become effective in less than 30 days (unless the Commission otherwise orders) and the Commission may suspend any filing and prescribe a rate in lieu thereof if, after hearing, it finds that the changed rate proposed by the suspended filing is unlawful.

We think that the conclusion that there is no legally enforceable contract rate after the seller's filing of a new schedule has become effective, other than the rate set forth in the newly filed schedule necessarily follows from the language of the Supreme Court in *Montana-Dakota U. Co. v. Northwestern P. S. Co.*, 341 U. S. 246, 251:

> "It [the customer company] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."

We do not see that this plain meaning of the rate filing and suspension provisions of Section 205 raises any question of constitutionality, as Sierra appears to contend,

citing *Wichita Railroad & Light Company* v. *Public Utilities Commission*, 260 U. S. 48. The provisions of the Kansas statute there involved seem plainly to have required commission approval before the filing of a rate change became effective which would distinguish that decision from the problem under the Power Act. As the Court

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pointed out in *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109, 112, when it was considering a decision of the Supreme Court of Missouri which had construed the Missouri public utilities statute[12] as allowing a utility to abrogate existing contract rates by the mere filing of a new schedule of rates (in addition to authorizing the rate order which the State Commission had later entered to the same effect):

> "Defendant's contention is not that the State lacked power by appropriate action to establish and enforce just and reasonable rates but that, as against the constitutional provisions invoked, the action taken under the public service commission law was not sufficient to abrogate the contract rates * * *. There is here involved no question as to the validity of the rates prior to the passage of the statute. Without expression of opinion, we assume that then the parties were bound by the contract. But the State has power to annul and supersede rates previously established by contract between utilities and their customers * * * and it [utility customer] here insists that the contracts could not be abrogated 'without a proper hearing, finding and order of the commission with respect thereto.' It does not, and reasonably it could not, contend that

[12] Revised Statutes of Missouri, 1929, Chapter 33, Art. 4. This statute is, in its here pertinent provisions, very similar to the Power Act.

immediate exertion by the legislature of the State's power to prescribe and enforce reasonable and nondiscriminatory rates depends upon or is conditioned by *specific adjudication in respect of existing contract rates.* It is clear that, *as against those specified in the contract here involved, the rates first filed by plaintiff* [*utility*] and those promulgated by the Commission in accordance with the statute *have the same force and effect as if directly prescribed by the legislature.* * * * Plainly, enforcement of the rates in accordance with the statute *did not violate either the contract clause of the constitution or the due process clause of the Fourteenth Amendment.*" (Emphasis supplied.)

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We, therefore, conclude that Sierra is in error in its contention that the filing should be rejected and that it cannot become effective upon the findings which we make. However, we may point out that if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful. For none of the evidence on this record warrants a finding that any rate would be reasonable that would produce a return of substantially less than the 4.75% resulting from the proposed rate, which is the minimum PG&E is willing to accept. Notwithstanding the stipulated fact that 5½% is generally a reasonable rate of return on the electric utility business of PG&E, the company is willing to accept a rate producing a 4.75% return from this particular part of that business as not unreasonably low; the evidence also shows that such a rate of return is not substantially different from the rate of return which it was willing to accept from this business

at the time it negotiated the 1948 contract rate, as we have already noted. It is apparent that PG&E regards the deficiency of .75 of a percentage point as warranted in order to attract and retain this particular business in the face of the alternatives that may have been available to Sierra. With the investment which PG&E has made and has undertaken to make in special facilities on which it would earn no return at all if it lost this particular business, it would require evidence of a kind not presented in this record to warrant a finding that the 4.75% rate of return it is willing to accept from this sale is unreasonably

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low. Not // only is there no such evidence but it affirmatively appears that this deficiency is not offset by any excess return from other sales subject to our jurisdiction and that the California Commission has ruled that such deficiencies may not be offset by excesses from other PG&E sales which are subject to its regulatory jurisdiction.[13] This, and the fact that no undue discrimination

[13] The Public Utilities Commission of California in an opinion dated October 15, 1952, in a proceeding involving a general rate increase by PG&E stated, with respect to the 1948 agreement with Sierra and certain other contracts PG&E had entered into (all of which were referred to as special resale contracts), at pp. 41-42 as follows:

> "The Commission, in considering these special contracts, is of the opinion that an opportunity should be afforded the parties to renegotiate these contracts, should they so determine. It is obvious that underlying costs have increased since these contracts were negotiated. Since by this decision a new basic resale schedule is being adopted, opportunity should be afforded for renegotiation of these contracts in the light of the new basic resale schedule. The revenues from these services will be computed at the new resale schedule for the purpose of determining applicant's over-all revenue requirements only, but the rates for such resale contract customers will not now be increased. By this method no burden will be placed on the other classes of customers but any burden will fall on the stockholders' portion of the earnings until such time as the contracts may have been renegotiated and have been authorized by the Commission."

or preference results from the deficiency, as we have already seen, makes clear that the proposed rate is not unreasonable and is lawful. But no such considerations, on this record, warrant a conclusion that any rate substantially lower than that proposed would be reasonable, and hence we would have to conclude that the 1948 contract rate is now unreasonable and unlawful.

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The Commission, having considered the record with respect to the matters involved and the issues presented and having issued its Opinion No. 270 which is hereby incorporated by reference and made a part hereof, further *finds:*

1. PG&E, as the holder of licenses issued for the hydroelectric projects designated in the records of the Commission as Project Nos. 77, 78, 87, 96, 99, 137, 175, 178, 180, 181, 184, 187, 233, 335, 423, 444, 471, 502, 525, 606, 616, 619, 708, 737, 772, 776, 802, 803, 869, 889, 911, 926, 1017, 1018, 1031, 1061, 1121, 1153, 1183, 1187, 1190, 1194, 1258, 1295, 1318, 1332, 1333, 1335, 1352, 1354, 1361, 1392, 1403, 1408, 1544, 1550, 1632, 1790, 1962, 2019, and 2118, is a licensee under Part I of the Federal Power Act.

2. PG&E is also a "public utility" within the meaning of Part II of the Act by reason of its ownership and operation of facilities among others for the transmission, and for the sale to Sierra for resale, of electric energy which is transmitted from California and consumed at points in Nevada, which facilities are in addition to, and do not include, facilities for the generation of electric energy, facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or

facilities for the transmission of electric energy consumed wholly by the transmitter.

[2608]

3. PG&E makes such sale to Sierra, as it has to that company or its predecessor since 1923, by transmission facilities enlarged from time to time, extending from its interconnected transmission system in California at a transmission substation known as the Drum Substation and a hydroelectric plant known as the Spaulding plant a distance of approximately 27 miles to a point of delivery at Summit near the Donner Pass in the Sierra Mountains, in California. Sierra receives delivery at Summit and transmits the energy thence by its transmission facilities connecting with its interconnected transmission system by means of which it serves customers in eastern California and a large area in northern and northwestern Nevada.

The present interconnecting transmission facilities consist of two 60 kv, and one 110 kv, three-phase, single circuit wood pole transmission lines and appurtenant facilities. Energy deliveries over the 60 kv lines are metered at Summit, while those over the 110 kv line are metered at Sierra's "California" substation with adjustment for intervening transmission losses.

4. In 1951, approximately nine-tenths of Sierra's energy sales were made in Nevada, six-sevenths of its customers are located in Nevada, and seven-eighths of its revenues are from Nevada, the remainder, California. Its purchases from PG&E in 1952 constituted approximately

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85% // of its peak demand and 77% of its total annual energy requirements. Approximately 86% of the kilowatt

hours purchased from PG&E in 1974 were used in the service of customers in Nevada.

5. The sale by PG&E to Sierra, the negotiation, execution and terms of the contract, and deliveries thereunder covered all energy delivered to Sierra without respect to the point of its ultimate consumption, whether in California or Nevada, and at no time has any distinction of any kind been made or attempted by the parties, or, so far as the record shows, by any regulatory agency, for any purpose, based upon the points of ultimate consumption.

6. The sale by PG&E to Sierra of all of the energy delivered at Summit is a sale at wholesale in interstate commerce, and subject to the provisions of Sections 205 and 206(a) of the Federal Power Act.

7. The following rate schedules have been filed with this Commission by PG&E for resale service to Sierra (or its predecessor) prior to the tender of the proposed Supplement No. 1 to its Rate Schedule FPC No. 3.

Rate Schedule No.	Other Party	Date of Agreement	Date Filed	Effective Date
FPC No. 1	Truckee River Power Company (Predecessor to Sierra)	3/23/23	2/17/39	9/1/23
FPC No. 2 (Supersedes FPC No. 1)	Sierra Pacific Power Co.	6/ 6/38	2/17/39	6/6/38
FPC No. 3 (Supersedes FPC No. 2)	Sierra Pacific Power Co.	3/ 4/48	6/ 7/48	1/1/48

8. The increased rate embodied in Supplement No. 1 to Rate Schedule FPC No. 3 has been satisfactorily shown to be such as to provide not more than a fair return on the portion of PG&E's net investment rate base properly allocable to that service after proper allowance for all operating expenses, as shown by Exhibit 19.

9. No other facts have been shown affecting the justness and reasonableness of the proposed rate, and it is therefore not unjust or unreasonable.

10. The proposed rate is substantially the same as the rate charged California-Oregon Power Company for the only other resale service rendered by PG&E in interstate commerce for which it has filed schedules with this Commission. Although the total cost of rendering this service to Sierra is approximately 1/7 more than serving California-Oregon, the two sales appear to be otherwise generally comparable. Inasmuch as it does not appear that the rate to California-Oregon exceeds the cost of serving it, or that the ultimate consumers connected therewith are placed at a competitive disadvantage as compared to ultimate consumers connected with this sale to Sierra, this cost differential does not, of itself, appear to make the proposed rate unduly discriminatory or preferential.

11. Inasmuch as the proposed rate to Sierra is not more than the cost of serving it and neither Sierra nor ultimate consumers served by it will suffer any competitive disadvantage by reason of the fact that PG&E makes certain other comparable resale sales in intrastate com-

merce // at rates estimated to be between 14% and in one case 38% below the proposed rate, such differences do not appear to amount to an undue discrimination or preference.

12. The proposed rate is not unlawful.

The Commission *orders:*

The proceeding initiated by our order issued March 13, 1953, in this docket be and the same hereby is terminated.

By the Commission. Commissioners Smith and Doty dissenting.

LEON M. FUQUAY,
Secretary.

Adopted: June 16, 1954
Issued: June 17, 1954

FEDERAL POWER COMMISSION ORDER AND OPINION NO. 270—(Contd.)

(Dissenting Opinion)

[2612]

DOTY and SMITH, Commissioners, *dissenting:*

We think no useful purpose would be served by our undertaking to analyze extensively or to answer in detail all the varied, and to a considerable degree labored, stages whereby the Commission's opinion supports the purely negative findings relied upon by the majority to justify the lawfulness of the rate change here under consideration. To do so would, we suspect, lead to still further confusion and obfuscation of what we regard as the relatively simple basic issues involved in this matter. As we see them, the essentials here are susceptible of straightforward and succinct determination.

While agreeing with the majority that the private contract between these parties (over which jurisdiction is admitted by both of them) is subject to our regulatory modification for adequate cause shown in a proper proceeding, we are not persuaded by the facts of record that such a showing has been made in this proceeding. Indeed, it is our conclusion that the evidence shows the rate provided for therein, when considered in relation to the other terms of the contract (which the Commission's order does not disturb) and in the light of all the relevant attendant circumstances and conditions, to be lawful, because not unjust, unreasonable, or unduly discriminatory —and therefore that it should be continued in effect.

[2613]

We reach this conclusion for three major, compelling reasons, which, while to some extent interrelated, may be distinguished and stated very briefly.

In the first place, it does not seem to us that the question is whether the proposed rate is substantially the same as that charged the California-Oregon Power Company for the interstate wholesale service furnished it by PG&E, but whether the circumstances surrounding the origin and development of existing contractual relationships between PG&E and Sierra have been such as to justify—or in equity to require—special consideration by us similar to that evidently given by the California Commission to the still lower rates granted by PG&E under special contracts to certain municipalities and cooperatives within that State, apparently for reasons not entirely unlike those which led to its initial favorable rate treatment of Sierra.

As we see it, such special consideration is clearly called for here. It is a matter of common knowledge that PG&E has constantly, vigorously, and with no little success resisted the expansion of sales of electric energy from federal hydroelectric projects to others within its general service area. The evidence here indicates that such considerations importantly influenced PG&E—and, no doubt, Sierra as well—in its negotiation of the long-term, exclusionary power-supply contract with Sierra on terms, so far as the rate is concerned, particularly favorable to the latter. It does not seem to us that the removal or diminution of the threat of competition from other potential

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power // sources should now, with our sanction, operate to deprive Sierra of the rate advantage of which it evidently

availed itself in good faith, and in reliance upon which substantial investments in facilities have been made. In vernacular terms, PG&E—like Sierra in respect of the undisturbed 15-year term of the contract and its restrictive covenant regarding power supply—having made its bed, should be required to lie in it,—absent some showing of harm to the public interest if this axiom were followed.

We find no such indication of any damage whatever to the public interest thereby. On the contrary, the record shows that PG&E has voluntarily undertaken to absorb any deficiencies of return under these special contracts from earnings which otherwise would be available to its stockholders. Hence, continuation of the rate stemming from its previously enjoyed bargaining position would neither necessarily constitute an undue preference to Sierra nor impose any consequential burden upon the other customers of PG&E.

This brings us to the second factor to which we attach major significance in this matter: Whether, under all the circumstances, the low over-all return produced in the past and anticipated in the future under the rate in question is properly compensatory to PG&E. We think so. Although it is clear that on a full allocation of electric system costs it will yield less than the 5½ per cent net return which PG&E accepts as fair for its system operations, no one on this record denies that it adequately

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covers out-of-pocket costs. The evidence // is by no means convincing as to what, if any, particular rate of return PG&E expected it to produce when the contract was negotiated, either then or in the future. In the circumstances, however, it appears extremely doubtful that any such

calculation was used—if, indeed, such a projection could then have been made with any degree of accuracy—as a basis for the managerial judgment exercised and decision made at that time. On the other hand, the evidence shows, not only that PG&E voluntarily undertook to absorb deficiencies of return under special contracts induced by considerations of competition and corporate policy, but also that its responsible officials recognized that such contracts could be justified in rate proceedings only on an incremental-cost basis.

We know of no rule or policy of this Commission to the effect that under any and all circumstances each rate for service must precisely return the full allocated system costs of such individual service. The weight of judicial opinion appears to be that, while individual rates must be compensatory, they may—and in practice quite frequently and naturally will—yield contributions of varying proportions to the over-all return of the enterprise. It is our opinion that, in all the circumstances of this case, the Commission should utilize the incremental-cost test in determining the reasonableness of the rate in question.

On this basis—according to additional evidence adduced during the reopened hearing, emphasized by Sierra in the reargument, and relied upon in its supplemental proposed findings and conclusions—the contract rate would produce

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at least a 6 per cent return on the facilities // employed in rendering the service to Sierra, or substantially more than that stipulated by PG&E as fair for its electric operations overall. We think this is indicative of the reasonableness of the contract rates, and that Sierra's request to file its proposed supplemental requests for findings of fact and

conclusions of law should not be brushed aside lightly as "unnecessary or unwarranted".

In this connection we note that, while the majority states that "* * * if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful", no such finding is made. Rather, it seems to have been carefully avoided. Is this because in a section 206 investigation it would be necessary, on the logic espoused, to raise Sierra's charges still further so as to yield a return at the stipulated 5½ per cent rate on fully-allocated system cost of the service? And the determinant of reasonableness here adopted appears to be the stated fact that PG&E "* * * is willing to accept a rate producing a 4.75% return from this particular part of that business as not unreasonably low * * * and regards the deficiency of .75 of a percentage point as warranted in order to attract and retain this particular business in the face of the alternatives that may have been available to Sierra." Does this mean that if PG&E were now willing to accept a return of 3 per cent and a deficiency of 2½ per cent, or a return of 2 per cent and deficiency of 3½ per cent, such acquiescence on the

[2617]

part of PG&E would be accepted as deter- // minative of the question? If so, what becomes of this Commission's function in respect of either the reasonableness *per se* of the rate or its possible unduly discriminatory relationship to other charges?

Finally, as to the matter of undue discrimination or preference, we must again disagree with the findings and approach of the majority. It concludes that, by comparison

with the rates of PG&E to California-Oregon Power Company and the fully-allocated costs of that and this service (Finding 10), and because the proposed rate to Sierra does not exceed the fully-allocated cost of service, *etc.* (Finding 11), the proposed rate is neither unduly discriminatory nor preferential.

From the foregoing discussion it is probably already clear that we regard these approaches as both invalid and directed to the wrong things, rather than to the essential issues in this case. Because of our views as to the reasonableness of the contract rate in terms of the initial purposes and undertakings of the parties and its present justification on an incremental-cost basis, we deem the comparison with PG&E's charges to the California-Oregon Power Company and the emphasis on computations of fully-allocated system costs as being beside the point. In our opinion the present contract rate should be affirmatively found to be neither unduly discriminatory nor preferential.

Furthermore, it is conceded that PG&E has contemporaneously maintained similarly favorable rates to certain California municipalities and cooperatives,—notably to the City of Redding, which is immediately adjacent to the Shasta Dam. While these rates are not subject to our

[2618]

jurisdiction, but to that of the California Commission, we note, as does the majority, that the California Commission in 1952 pointed out that "* * * opportunity should be afforded for renegotiation of these contracts in the light of the new [increased] basic resale schedule." According to the record here, this has not been done; yet, under the theory of the majority opinion here the way would be open

to raise such charges through unilateral action by the filing of higher tariffs. It seems strange justice to apply two different standards to possible discriminatory tactics by the same company under two different jurisdictions, without any effort to reconcile the two through cooperative consideration and consistent action by the federal and state agencies concerned.

DALE E. DOTY, Commissioner

NELSON LEE SMITH, Commissioner

Filed: June 16, 1954
Issued: June 17, 1954

478 In United States Court of Appeals for the District of Columbia Circuit

[File endorsement omitted.]

No. 12430

SIERRA PACIFIC POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
PACIFIC GAS AND ELECTRIC COMPANY, INTERVENOR

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Opinion

Filed February 24, 1955

Decided February 24, 1955

Mr. William C. Chanler, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of Court, with whom Mr. Lawrence A. Baker was on the brief, for petitioner.

Mr. Howard E. Wahrenbrock, Assistant General Counsel, Federal Power Commission, with whom Mr. Willard W. Gatchell, General Counsel, Federal Power Commission, was on the brief, for respondent.

Mr. F. T. Searls, of the bar of the Supreme Court of California, pro hac vice, by special leave of Court, with whom Mr. Robert E. May was on the brief, for intervenor.

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges

BAZELON, Circuit Judge: In 1938, Pacific Gas and Electric Company, a public utility under the laws of California,
479 and Part II of the Federal Power Act,[1] entered into its second 45-year contract to sell electric energy to Sierra Pacific Power Company, a public utility under the laws of California and Nevada. With the end of World War II, it became apparent that before expiration of this contract in 1953 Sierra's rapidly increasing demands would require either the construction of an additional transmission line into its area by P G & E, or the development of a new source of power. Accordingly, in 1947 Sierra commenced negotiations with P G & E and the Bureau of Reclamation which offered to furnish power from Shasta Dam.

[1] 49 Stat. 847 et seq. (1935), 16 U. S. C. § 824 et seq. (1952).

At first P G & E offered a 15-year contract at the 1938 contract rates but with an "escalator fuel clause." Sierra rejected this and turned to intensive negotiations with governmental agencies for "cheap Government power." P G & E then proposed a lower rate (the so-called P–31 schedule) for the same term without the escalator clause. This proposal was accepted in June 1948 and embodied in a contract which was duly filed with the California Public Service Commission and the Federal Power Commission. The P–31 schedule was a lower rate approved by the California Public Service Commission (formerly Railroad Commission) to enable P G & E to retain business of customers that would otherwise "be lost altogether" to public power competition. But a significant condition of this approval was that any loss from such service would be borne by P G & E's stockholders and not by its other customers.

In 1952, however, when public power from Shasta Dam was no longer available to Sierra, P G & E sought the California Commission's approval for rate increases for Sierra and other
480 customers under the P–31 schedule.[2] The Commission refused on the ground that the special contracts were entered into "in order to forestall alleged government competition and with the clear understanding that its stockholders must bear any burden * * *." In February 1953, in a further effort to increase its rates, P G & E filed the schedule of increased rates in question here with the Federal Power Commission under § 205 of the Federal Power Act.[3] Sierra thereupon intervened. It urged that § 205, which provides for Commission approval of newly proposed rates merely upon a finding that they are reasonable, is not applicable where, as here, approval would effect unilateral abrogation of a duly filed rate contract; that to effect such abrogation the Commission must first make the determination, provided for in § 206 (a), that the rate contract to be superseded is "unjust, unreasonable, unduly discriminatory or preferential * * *."[4] The Federal Power Commission rejected this contention by a vote of three to two and approved the increased rates upon a finding, under § 205, that they were reasonable. Sierra brought this petition to review the Commission's action.

The novel and important question for decision is whether and to what extent the preexisting right of utilities to enter into enforceable rate contracts has been abrogated by the Commission's power under the Act to regulate rates. Congress did not expressly abrogate that right. To find such abrogation by implication,

"* * * we must be guided by the principle that repeals by

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[2] With the significant exception of one city which still could have utilized Shasta Dam power.

[3] 49 Stat. 851 (1935), 16 U. S. C. § 824d (1952).

[4] 49 Stat. 852 (1935), 16 U. S. C. § 824e (a) (1952).

implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preexisting right
481 is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." [5]

So guided, we examine the pertinent provisions of the Act.

Section 205 (a) of the Federal Power Act requires that rates for the sale of electric energy within the Commission's jurisdiction shall be "just and reasonable." Section 205 (c) provides that all rates, charges and contracts relating thereto shall be filed with the Commission. Section 205 (d) provides that no change in such filed rates, charges, or contracts relating thereto shall be made without notifying the Commission. Section 205 (e) authorizes the Commission, upon complaint or upon its own motion, to determine whether the newly proposed rate or charge is just and reasonable. In modifying a filed rate under § 205, it is not necessary to prove that the original rate is unjust or unreasonable; the new rate will take effect if the utility sustains the burden of proving that it is "just and reasonable." [6]

Under § 206 (a), on the other hand, a finding of unreasonableness is a prerequisite to modification of a filed rate. That section authorizes the Commission, upon its own motion or upon complaint, to find that a rate, or contract affecting such rate, is "unjust, unreasonable, unduly discriminatory or preferential." If it so finds, it must determine and fix a "just and reason-
482 able rate, charge * * * or contract * * * to be thereafter observed * * *." [7]

The Commission argues that under both §§ 205 and 206 (a) "the statutory scheme is to depend upon regulatory action and initiative in lieu of private contract to protect the buyers' interests—in the public interest." But we think this stretches the statutory scheme too far. The Act's primary aim is that only just and reasonable rates shall be charged. Since "statutory reasonableness is an abstract quality represented by an area rather than a pinpoint," [8] the statutory purpose may be satisfied by more than one rate. Clearly, if contract rates are reasonable, the public interest does not require allowance of higher rates upon unilateral application of the seller under § 205, just because the Commission deems the higher rates also to be reasonable. Therefore, it

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[5] Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 437 (1907). Cf. Federal Power Comm'n. v. Niagara Mohawk Power Corp., 347 U. S. 239, 252-53 (1954), where the Court remarked: "To convert this Act from a regulatory Act to one automatically abolishing preexisting water rights on a nationwide scale calls for a convincing explanation of that purpose."

[6] 49 Stat. 852 (1935), 16 U. S. C. § 824d (e) (1952).

[7] 49 Stat. 852 (1935), 16 U. S. C. § 824e (a) (1952).

[8] Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U. S. 246, 251 (1951).

does not "deprive the statute of its efficacy" to give effect to a duly filed rate contract until such time as the rates specified therein are found unreasonable under § 206 (a).

We cannot agree with the Commission that this view of the statutory scheme is inconsistent with § 205's requirement that contracts and notice of any changes therein shall be filed with the Commission.[9] Regarding a comparable requirement in a Kansas statute, the Supreme Court said, "The consent of the Commission * * * is made necessary only to prevent changing schedules without notice to the Commission and thus to secure a proper supervision of schedules."[10] Obviously the mere fact that
483 two parties have agreed upon a rate, or to a change therein, does not effect an exemption from regulation. We think these references contemplate continued use, rather than abandonment, of rate contracts.

Our view of the statutory scheme is supported by a recent Third Circuit case, Mobile Gas Service Corp. v. Federal Power Commn.,[11] and the authorities therein relied upon. Although the case arose under the Natural Gas Act, §§ 4 and 5 (a) of that Act corresponds almost verbatim with §§ 205 and 206 (a) of the Power Act.[12] There, as here, the Commission had abrogated a preexisting contract without any finding that the contract rate was unreasonable. With one judge dissenting, the Court of Appeals, in a carefully considered opinion, reversed the Commission's order. The court relied upon: (1) cases arising under the Public Utility Law of Kansas which contained provisions similar to §§ 4 and 5 (a) of the Natural Gas Act;[13] (2) the interpretation of the
484 Gas Act adopted by the Court of Appeals for the Tenth Circuit in Colorado Interstate Gas Co. v. Federal Power Comn.;[14] (3) the doctrine that common law rights will not be impaired without a clear authorization;[15] (4) a colloquy at hear-

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[9] 49 Stat. 851 (1935), 16 U. S. C. § 824d (c) and (d).

[10] Wichita R. R. v. Public Utilities Commn., 260 U. S. 48, 56-57 (1922).

[11] 215 F. 2d 883 (3d Cir. 1954).

[12] The Commission urges that the Mobile case differs from the present case in that the Commission was powerless under § 4 (e) of the Gas Act to suspend the proposed increase pending determination of its reasonableness. While such a distinction exists, it was in no way determinative.

[13] The Supreme Court of Kansas, in Kaul v. American Independent Telephone Co., observed: "The passage of the Act did not automatically overthrow contracts nor set aside schedules of rates which had been agreed upon * * * *rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates.*" 95 Kans. 1, 4 (1915); emphasis supplied.

This view of the Kansas statute was embraced by the Supreme Court of the United States in Wichita R. R. v. Public Utilities Commn., 260 U. S. 48 (1922), and by the Court of Appeals for the Tenth Circuit in Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., 64 F. 2d 881 (10th Cir. 1933).

[14] 142 F. 2d 943, 954 (10th Cir. 1944), *affirmed*, 324 U. S. 581 (1945), where the Court said: "The passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. Neither did it ipso facto set aside the schedules of charges upon which they had agreed. *Such rates and charges could be modified only after a finding of unreasonableness.*" Emphasis supplied.

[15] Citing Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426 (1907); and Federal Power Commn. v. Niagara Mohawk Power Corp., 347 U. S. 239 (1954).

ings on a predecessor bill:[16] and (5) the significant lack of debate on the question in view of the drastic impact wholesale
485 abrogation of contracts would have had on the natural gas industry.[17] These grounds apply here.

Cases relied on by the Commission do not sustain its position. Tyler Gas Service Co. v. United Gas Pipe Line Co., which the Commission asserts is inconsistent with the Mobile case, expressly withheld any opinion as to the correctness of that decision.[18] Midland Realty Co. v. Kansas City Power & Light Co. upheld the constitutionality of the procedure adopted here by the Commission, but did so "upon the construction that the [Missouri] supreme court put upon the statute."[19] Obviously, in construing the Federal Power Act, we are not bound by the Missouri court's construction of its statute.

Although the Commission has at all times insisted that no finding of unreasonableness is required, the majority opinion approving the increase stated:

"* * * if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful. For none of the evidence in this record warrants a finding that any rate would be reasonable that would produce a return of substantially less than the 4.75% resulting from the proposed rate, which is the minimum P G & E is willing to accept." This statement, however, is based entirely upon a record made in a proceeding under § 205 (e) in which the unreasonableness of the contract rate was not in issue. And, in any event, as the
486 dissenting Commissioners observed, "no such finding is made. Rather, it seems to have been carefully avoided."

For the foregoing reasons, the order under review is set aside and the case remanded to the Commission with instructions to dismiss the proceeding, without prejudice to the initiation of a new proceeding under § 206 (a).

So ordered.

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[16] Since the provisions in question were virtually identical with those of the Power Act, which were already in operation, the witness' understanding of their meaning is pertinent here. That colloquy reads as follows:

"Mr. HALLECK. Of course, it is your idea that if this bill should pass and the Commission be given the authority contemplated in this bill, that the contract could be superseded or invalidated insofar as attempt to fix the rates of charges is concerned?

"Mr. BOOTH. That certainly would be my position and we certainly would ask the Federal Power Commission promptly to consider the question as to whether or not the Natural Gas Pipeline Co. of America is earning an unfair return from the fair value of its property." Hearings before House Committee on Interstate and Foreign Commerce on H. R. 4008, p. 43, 75th Cong., 1st Sess. (1937).

This clearly suggests the understanding that contracts would remain in force unless they were "earning an unfair return * * *," i. e., were unjust and unreasonable.

[17] We have been referred to no pertinent legislative history of the Federal Power Act, nor have we been able to find any discussion of the present problem in either the debates or committee reports.

[18] 217 F. 2d 73, 78 (5th Cir. 1954).

[19] 300 U. S. 109, 113 (1937).

487 In United States Court of Appeals for the District of Colombia Circuit

[File endorsement omitted.]

No. 12430

SIERRA PACIFIC POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
PACIFIC GAS AND ELECTRIC COMPANY, INTERVENOR

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges

Decree

Filed February 24, 1955

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration where, It is ordered and decreed by this Court that the order on review in this case be, and it is hereby, set aside, and that this case be, and it is hereby, remanded to the said Federal Power Commission for further proceedings in conformity with the opinion of this Court.

Dated February 24, 1955.

Per Circuit Judge BAZELON.

488 In United States Court of Appeals

[File endorsement omitted.]
[Title omitted.]

Motion by petitioner to amend the last paragraph of the Court's opinion

Filed March 3, 1955

Comes now Sierra Pacific Power Company, Petitioner in the above entitled proceeding, and respectfully moves the Court for an order directing that the last paragraph of the Opinion of the Court entered herein, which now reads as follows:

"For the foregoing reasons, the order under review is set aside and the case remanded to the Commission with instructions either

to dismiss the proceeding or for further proceedings under § 206 (a)."

be amended so that the same shall hereafter read as follows:

"For the foregoing reasons, the order under review is set aside and the case remanded to the Commission with instructions to dismiss the proceeding, without prejudice to the initiation of a new proceeding under § 206 (a)."

In support thereof, Sierra Pacific Power Company ("Sierra") respectfully shows the following:

489 The proceeding in which the order under review was entered is a proceeding under Section 205 of the Federal Power Act, initiated by the filing of a schedule of increased rates by Pacific Gas and Electric Company. Pursuant to the provisions of Section 205 (e), that schedule became effective on September 6, 1953, five months after the Commission's order of suspension was entered, and has remained the "filed rate" since that date. As a result Sierra has been paying, and is now paying, approximately $420,000 per year in increased rates in excess of the amount due under its contract.

In its opinion herein this Court sustained Sierra's contention that its contract rate could not be increased by the mere filing of a schedule of new rates under Section 205, and that the existing contract remained valid and binding until and unless set aside in a proceeding under Section 206 (a) of the Federal Power Act. But under the last sentence of the said Opinion, as it now reads, it would seem that the Commission could proceed with further hearings pursuant to Section 206 (a) without dismissing the pending 205 proceeding.

If the Commission should enter upon such a course, it would not be entirely clear what the legal rate would be, during the pendency of the 206 (a) proceeding. For the Supreme Court has held that the only legally enforceable rate is the existing filed rate (Montana-Dakota U. Co. *v.* Northwestern P. S. Co., 341 U. S. 246, 251). Thus, until the pending Section 205 proceeding under which the schedule of increased rates has been filed is dismissed, it could be argued that the rates provided for in that schedule remained the existing "filed rates," notwithstanding this Court's

490 decision that the contract rate could not be changed unilaterally in a proceeding under that Section. It is respectfully submitted that, as this Court has held that the proposed increases are illegal, the proceeding in which they were filed and became effective should be dismissed, irrespective of whether or not the Commission determines to initiate further proceedings under Section 206 (a).

Wherefore, Sierra Pacific Power Company respectfully prays that the Court issue an order amending the last paragraph of its

Opinion entered in the above entitled case so that as amended such last paragraph of the Opinion shall read as follows:

"For the foregoing reasons, the order under review is set aside and the case remanded to the Commission with instructions to dismiss the proceeding, without prejudice to the initiation of a new proceeding under § 206 (a)."

Respectfully submitted.

LAWRENCE A. BAKER,
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40 Wall Street, New York 5, New York,
Attorney for Petitioner,
Sierra Pacific Power Company.

491 In the United States Court of Appeals

[File endorsement omitted.]
[Title omitted.]

Respondent's objections to petitioner's motion to amend the Court's opinion.

Filed March 10, 1955

The Federal Power Commission has asked the Solicitor General of the United States to petition the Supreme Court for certiorari to review the judgment in this proceeding along with its review of the Third Circuit's decision which this Court's opinion cites as supporting its view of the Act. Mobile Gas Service Corporation v. F. P. C., 215 F. 2d 883, certiorari granted, February 28, 1955. But assuming arguendo, the correctness of the ruling that P. G. & E.'s 1948 rate cannot be increased without a finding under Section 206 (a) that it is unlawful, the Commission opposes Petitioner's motion for the reasons hereinafter stated.

The Court's opinion would remand the case to the Commission with instructions—

"to dismiss the proceeding or for further proceedings under § 206 (a)."

Petitioner's amendment would preclude any alternative to dismissal by making the instruction read:

"to dismiss the proceeding without prejudice to the initiation of a new proceeding under § 206 (a)."

One effect of such an amendment would be to preclude the Commission from correcting the error found by the Court in the same proceeding in which it was committed. That error was in reading the Act as providing that the 1952 increased rate

must be allowed, if found lawful, without having placed in issue
the lawfulness of the 1948 rate and without having
492 made a finding that it was unlawful. Although the Commission's order setting the hearing (R. 2090–2093) did not state that the question to be one of the issues, the Court's opinion clearly indicates that it might have done so, and if it had, and the 1948 rate had properly been found to be unlawful, the new rate could have been allowed to stand, on the finding that it is lawful.

Accordingly, one way of correcting the error may be for the Commission to reopen the proceeding before it, following remand, to afford an opportunity for hearing and to make a finding on that issue.

As the Supreme Court noted in Ford Motor Co. v. National Labor Rel. Bd., 305 U. S. 364, 373–374:

"It is familiar appellate practice to remand causes for further proceedings * * * where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points. * * * If findings are lacking which may properly be made upon the evidence already received, the Court does not require the evidence to be reheard. * * * If further evidence is necessary and available to supply the basis for the findings on material points, that evidence may be taken. * * * Whatever findings or order may subsequently be made will be subject to challenge if not adequately supported or the (Commission) has failed to act in accordance with the statutory requirements."

By precluding that method of correcting the error found by the Court, Petitioner's amendment would limit the Commission to the initiation of a new proceeding for that purpose, even though the fact may be that the 1948 rate has been unlawful since before February 2, 1953, when the increased rate was filed, and even though the increased rate was lawful from that date, as the Commission found. In such a new proceeding the correction of the error would be made effective only from the effective date of an order issued in that proceeding, inasmuch as the Commission has no power to grant reparations (Montana Dakota U. Co. v. Northwestern P. S. Co., 341 U. S. 246, 254; S. Rept. No. 621, 74th Cong., 1st sess., p. 20; cf. Hope Natural Gas Co. v. F. P. C., 196 F. 2d 803). In the Commission proceeding which the
493 Court has reviewed, on the other hand, the effective date of the increase, if allowed to stand, is September 6, 1953 (R. 2494) as specified in the Commission's suspension order of March 13, 1953 (R. 2091).

While the Court has held that Section 206 (a) requires a finding as to the unlawfulness of the 1948 rate, it has not held that the effective date provisions of Section 205 (e) are invalid. Its holding appears to go to the meaning of the provisions of Section 206 (a) as picked up by the provision in Section 205 (e) that in proceedings of the kind here involved "the Commission may make such order with reference thereto [i. e., to the changed rate] as would be proper in a proceeding initiated after it had become effective [i. e., a § 206 (a) proceeding]." Cf., Transcontinental & W. Air v. C. A. B., 336 U. S. 601, 605.

Such a restriction as the amendment would impose on the administrative responsibility of the Commission under the Act is clearly in conflict with the principles which should govern the relation of administrative agencies and reviewing courts. As the Supreme Court said in United States v. Morgan, 307 U. S. 183, 191:

"* * * in construing a statute setting up an administrative agency and in providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty with regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action."

Furthermore, the amendment, by precluding the possibility of correction of the error in the original proceeding, with the resulting delay of two years or more in the effective date, would involve a difference of $420,000 a year (see Petitioner's Motion, p. 2), or at least $840,000. Thus the practical effect of the amendment would be to deprive P. G. & E. of that $840,000 as effectively as a final adjudication of the right to that amount, and do that without initial administrative consideration of that question.

494 That would be to disregard the firmly established principle that the court will stay their hands until the expert administrative agency to which Congress has entrusted a policy or factual determination has had an opportunity to act. F. P. C. v. Idaho Power Co., 344 U. S. 17, 20–21; Far East Conference v. United States, 342 U. S. 570; Tank Car Corporation v. El Dorado Terminal Co., 308 U. S. 422, 432–433; St. Louis, Brownsville & Mexico Ry. Co. v. Brownsville Navigation District, 304 U. S. 295, 301; Southern Ry. Co. v. Tift, 206 U. S. 428, 437–438; Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 448; see also United States v. Interstate Commerce Commission, 337 U. S. 426,

437; United States v. Jones, 336 U. S. 641, 652–653, 670–671, 672–673.

The most recent statement of the rule requiring judicial deference to primary administrative jurisdiction is found in F. P. C. v. Idaho Power Co., supra, where the Supreme Court reversed a judgment of this Court, striking out a condition the Commission had inserted in an order issuing a license and affirming the order without the condition. The Supreme Court said (344 U. S. at pp. 20–21):

It is the Commission's judgment on which Congress has placed its reliance for control of licenses. See §§ 6, 10 (a), 10 (g). When the court decided that the license should issue without the conditions, it usurped an administrative function. * * * The guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration. See Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134; Federal Trade Commission v. Morton Salt Co., 334 U. S. 37.

The Court, it is true, has power "to affirm, modify, or set aside" the order of the Commission "in whole or in part." § 313 (b). But that authority is not power to exercise an essentially administrative function. See Ford Co. v. Labor Board, 305 U. S. 364, 373–374; Siegel Co. v. Federal Trade Commission, 327 U. S. 608.

Another comparatively recent statement of the rule is found in

Far East Conference v. United States, supra, where the
495 Court "applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over" (p. 574). The Court also stressed the policy of achieving "uniformity and consistency in the regulation of business entrusted to a particular agency * * * by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" (pp. 574–575).

And the same principle has been applied in circumstances like these, where some aspect of administrative action has been held beyond the agency's authority. It has been recognized that the administrative judgment may be affected by the new situation which the limitation of its power creates. Accordingly, remand of the proceedings to the administrative agency for the exercise of its expert judgment in the light of the changed circumstances has been deemed the proper procedure. Federal Trade Commission v. Morton Salt Co., 334 U. S. 37, 55; Siegel Co. v. Federal

Trade Commission, 327 U. S. 608, 612–614; Addison v. Holly Hill Co., 322 U. S. 607, 618–619; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 145; Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 373–374; Federal Trade Commission v. Royal Milling Co., 288 U. S. 212, 218; United States v. Morgan, 307 U. S. 183.

Statutory requirements for initial administrative determinations would be frustrated if this Court's suggestion, that more than one rate might be reasonable (slip sheet p. 7), were to be treated as a determination of the lawfulness of the 1948 rate, as Petitioner impliedly assumes when it argues that "this Court has held that the proposed increases are illegal" (Mo. p. 3). Correction of an error of law in the agency's determination exhausts the judicial power. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134. Judicial review of
496 a legal question "does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge" and the Commission is "again charged with the duty of judging the application" by the applicable statutory standard of "public convenience, interest, or necessity." 309 U. S. at 145.

The proper procedure in remanding is shown in Connecticut Light and Power Co. v. F. P. C., 324 U. S. 515, 532–536. There the Commission had found an electric company to be a "public utility" under the Act by reason of its ownership and operation of facilities used for transmission of electric energy in interstate commerce as distinguished from local distribution of that energy, regarding transmission and local distribution as used in the Act as having mutually exclusive meanings. The Supreme Court held that transmission extended all the way to the "toaster on the breakfast table" and set aside the Commission's order for want of an explicit finding that the transmission facilities upon which it predicated its determination were not used in local distribution. But instead of ordering the proceeding dismissed for failure to make that finding, it remanded for further proceedings consistent with its opinion.

It is respectfully submitted that the same course would be a proper form of remand here.

A further objection to Petitioner's motion is that it adopts the Court's language, "to dismiss the proceeding" and treats it as the equivalent of an instruction to reject the proffered rate filing. Rejection of a rate filing where its legality depends upon the determination of a factual question is precisely what the Third Circuit has held to be beyond the Commission's authority. Mississippi River Fuel Corporation v. F. P. C., 202 F. 2d 899. There is no contention here that the rate schedule embodying the in-

creased rate, as tendered for filing, does not conform to the Commission's rules, which was the ground upon which the Third Circuit tried to distinguish the Mississippi River Fuel case in Mobile Gas Service Corporation v. F. P. C. (215 F. 2d
497 883, 891-892) which this Court's opinion cites as supporting its view of the law.

Accordingly the Commission opposes the granting of Petitioner's motion.

Respectfully submitted.

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General Counsel.

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HOWARD E. WAHRENBROCK,
Assistant General Counsel,
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Federal Power Commission, Washington 25, D. C.

MARCH 10, 1955.

498 Certificate of service [omitted in printing].

499 In the United States Court of Appeals

[File endorsement omitted.]
[Title omitted.]

Answer of Intervener to motion to amend opinion

Filed March 10, 1955

To the United States Court of Appeals for the District of Columbia:

Intervener, Pacific Gas and Electric Company, answers the motion of Petitioner, Sierra Pacific Power Company, in the above-entitled proceeding for amendment of the Court's opinion therein and requests that said motion be denied.

Said motion requests this Court, in effect, to deny to the Federal Power Commission the power to proceed further in this case, even in a manner consistent with this Court's decision. Intervener submits that, if the ground of decision in this case stands, the case should be remanded to the Commission so that it may make a determination and finding as to the issue of reason-
500 ableness of the contract rate. (Although intervener does not concede the correctness of the ground of decision and intends to petition the Supreme Court of the United States for a writ or certiorari to review said decision it is assumed to be

correct for the purpose of this answer.) In support of its opposition to said motion intervener shows as follows:

I

The present proceeding is appropriate for consideration of the issue of reasonableness of the contract rate as is shown by the following facts in the record:

1. The Commission, in suspending P G & E's rate filing and ordering a hearing, stated Sierra's contention to be that the contract rate "is just and reasonable and not unduly preferential or discriminatory because of other considerations for the rendering of service, at the time the present agreement was entered into" (Order of March 12, 1953, R. 2090–2092).

2. In permitting Sierra to intervene in this proceeding and denying Sierra's request for rejection of the rate filing because not authorized under Section 205 (d) of the Federal Power Act the Commission expressly stated that the denial was without prejudice to Sierra's right to maintain its contentions (Order of April 17, 1953, R. 2162–2163).

3. In denying Sierra's petition for rehearing as to the last mentioned order, the Commission said that its denial "was conditioned to preserve to Sierra its right to maintain thereafter in
this proceeding the contentions then advanced by it and
501 did not constitute a final determination by this Commission
of the substantive issue as to which Sierra now seeks rehearing" (R. 2221–2222).

4. At the hearing on this matter, the Examiner for the Commission took the position that he was required to admit evidence material to Sierra's contentions in view of the Commission's preservation of Sierra's rights and all such evidence offered by Sierra was received (See e. g., R. 305).

5. At the conclusion of the hearing, P G & E submitted proposed findings including a finding that the contract rate is unjust and unreasonable (R. 2441).

6. Sierra submitted at the conclusion of the hearing proposed conclusions of law that the contract rate is just and reasonable and that P G & E failed to show the contrary.

7. In its opinion on this matter the Commission stated that "All parties were afforded an opportunity to present evidence in support of their respective positions" (R. 2586).

It is clear, therefore, that the error of law which the Court has found should be corrected by the Commission in this proceeding.

It should not be material that the proceeding was initiated as a result of a filing in accordance with Section 205 (d) rather than by a complaint under Section 206 (a). We have long passed the days when forms of actions govern the result of cases. It should

also be noted that under Section 205 (e) the Commission may make such orders with reference to the rate in question as would be proper in a proceeding initiated after the rate had become effective, i. e., in a Section 206 (a) proceeding.

502 To require initiation of a new proceeding would involve duplication of the prior hearings to no purpose. The Commission should be permitted to take appropriate steps in the present proceeding to pass upon the issue of reasonableness of the contract rate so the matter may be brought to an expeditious conclusion.

P G & E believes that it is fully entitled to an increase in the contract rate under the law as laid down by this Court. Courts and administrative bodies necessarily require time to dispose of controversies but it would be most inequitable to submit P G & E to the further delay of going through another complete proceeding when the matter is already the subject of a pending proceeding where the only error is one of law made at the conclusion of the proceeding.

Indeed, we fail to see how Sierra could be prejudiced in any sense by returning the case for further proceedings by the Commission. If Sierra's contention as to reasonableness of the contract rate is sustained it will lose nothing. If not, it will be charged only with a rate which is just and reasonable in accordance with the law as laid down by this Court. Sierra's motion may very properly be characterized as an attempt to evade, as long as possible, the imposition of a lawful rate increase if such should be found justified. This Court should not lend its process to such an end.

II

The Court cannot grant the Petitioner's motion without invading the functions of the Federal Power Commission. Having pointed out the error of law which it believes affected the

503 Commission's decision the Court very properly sent the case back for further proceedings if deemed appropriate by the Commission (Federal Power Commission v. Idaho Power Co., 344 U. S. 17). It is so well established that a Court may not take over the rate fixing duties of the Commission that further citation of authority is unnecessary.

The failure of the Commission to make a finding as to the reasonableness of the contract rate is not the equivalent of a finding of reasonableness, especially when the Commission has expressed its conclusion to the contrary. Consequently, the proper disposition of the present matter cannot be known until the Commission has passed upon that question. This Court has not attempted to make that decision for the Commission and should not do so at Petitioner's urging by ordering dismissal.

Equitable consideration of the rights of the parties requires further proceedings by the Federal Power Commission.

If the case is remanded to the Commission for further proceedings the Commission will have an opportunity to correct its error and do equity according to the circumstances of the case. Neither P G & E nor Sierra should be prejudiced by the failure of the Commission to make a finding on the contract rate.

Since the rate increase became effective on September 6, 1953, P G & E has collected increased charges from Sierra at the higher rate. The increase was originally estimated at about $420,000 per year and has actually exceeded that amount. If the Commission should find that the contract rate was reasonable this
504 increase will have to be refunded to Sierra. If, on the other hand, the Commission makes a contrary finding P G & E in equity and good conscience should be entitled to retain the increase since the unreasonableness will relate to the entnire period during which the increase was collected. See Atlantic Coast Line R. Co. v. Florida, 295 U. S. 301.

The decision of this Court insofar as it remands the case to the Commission with opportunity for further proceedings is in full accord with law and equity and should not be modified.

Wherefore, intervener respectfully requests that the motion to amend the opinion herein be denied.

Respectfully submitted.

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505 Certificate of Service [omitted in printing].

506 In United States Court of Appeals

[File endorsement omitted.]
[Title omitted.]

Petitioner's reply to respondent's and intervenor's objections to motion to amend the Court's opinion

Filed March 15, 1955

It is respectfully submitted that the objections which the Commission and Pacific Gas and Electric Company make to Sierra's

motion to amend the opinion in this case conclusively indicate the necessity of the requested amendment. For the position taken by both is that under this Court's decision it would be perfectly proper for the Commission to hold, after further hearings in the pending proceeding, that the contract in question is unreasonable and that therefore the filed increase, which became effective in September 1953, has been the legal rate since that date. This would mean that a party to a rate contract may increase the rate unilaterally by a filing under Section 205, without any finding as to the reasonableness of the existing
507 contract, and that the Commission can retroactively legalize the increase by a later determination that the contract is unreasonable.

As we read this Court's opinion, it holds that a contract rate may not be increased unilaterally by a filing under Section 205, but is valid and binding until and unless set aside by the Commission after a hearing and finding as prescribed in Section 206 (a). Indeed, that is the precise holding of the Court of Appeals for the Third Circuit in the Mobile case (Mobile Gas Service Corporation v. Federal Power Commission, 215 F. 2d 883 (1954)). For the only question presented in that case was whether the filing of a rate increase under Section 4 of the Gas Act in violation of a contract was legal. The Third Circuit held that it was not and directed that the filing be rejected. The Commission and Pacific Gas and Electric Company are now interpreting this Court's opinion as being directly in conflict with that decision: that such a filing under Section 205 is valid, and remains valid until and unless the Court in later proceedings should find that the contract was not unreasonable. As we read this Court's opinion, it has held exactly the opposite.

The Commission bases its contention in part upon the fact that, in ordering the hearings that have been held, it reserved Sierra's rights to present its contentions regarding the legal effect of its contract at those hearings. Accordingly, says the Commission, it may now make a retroactive finding, on that record and in that proceeding, that the contract is and has been
508 unreasonable since the institution of the proceeding. It may be that the Commission has power to consolidate the existing record with a new proceeding instituted under Section 206 (a), and then make a finding as to the reasonableness of the contract on that record without the presentation of additional evidence (and as we have indicated in our principal brief, we think it is clear that such a finding must be that the contract is reasonable). But this does not mean that the filed rate increase could now be retroactively validated as of September 6, 1953, as if the contract had been found invalid prior to that date. For

as we read this Court's opinion, until the contract is set aside, the only legal rate is the filed contract rate, and not the unlawfully filed increased rate. It follows that the proposed increased rate must be set aside and the illegal payments of $420,000 per year exacted thereunder repaid to Sierra, regardless of whether or not the Commission should ultimately find the contract reasonable or unreasonable.

In order to clarify this question, it is respectfully requested that Sierra's motion to amend the Court's opinion be granted.

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Attorney for Petitioner,
Sierra Pacific Power Company.

Of Counsel:
WILLIAM C. CHANLER.

509 In United States Court of Appeals

[File endorsement omitted.]
[Title omitted.]

Order Granting Motion to Amend Opinion

Filed March 23, 1955

Upon consideration of petitioner's motion to amend the last paragraph of the opinion of this Court, entered herein February 24, 1955, of the answer thereto filed by intervenor, and of the objections to said motion filed by respondent, and of petitioner's reply to said answer and objections, it is

Ordered by the Court that the aforesaid motion be granted and that the last paragraph of the opinion be, and it is hereby, amended to read as follows:

"For the foregoing reasons, the order under review is set aside and the case remanded to the Commission with instructions to dismiss the proceeding, without prejudice to the initiation of a new proceeding under § 206 (a)."

PER CURIAM.

Dated March 23, 1955.

510 Designation of Record [omitted in printing].

512 Clerk's certificate to foregoing transcript omitted in printing.

513 Supreme Court of the United States

No. 736, October Term, 1954

FEDERAL POWER COMMISSION, PETITIONER

v.

SIERRA PACIFIC POWER COMPANY

Order allowing certiorari

Filed May 23, 1955

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit is granted, and the case is assigned for argument immediately following Nos. 436 and 556.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

515 Supreme Court of the United States

No. 744, October Term, 1954

PACIFIC GAS AND ELECTRIC COMPANY, PETITIONER

v.

SIERRA PACIFIC POWER COMPANY

Order allowing certiorari

Filed May 23, 1955

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit is granted, and the case is assigned for argument immediately following Nos. 436 and 556.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1955